

Exhibit A

1 May 11, 2015, United States v. Zolot and Pliner

2 CHARGE TO THE JURY:

3 (Jury enters the courtroom.)

4 THE COURT: Don't be seated. Stay standing. The jury
5 should remain standing. Good afternoon.

6 THE JURY: Good afternoon.

7 THE COURT: There's an old tradition in the courts of
8 our Commonwealth and in the Federal Court that at this stage of
9 the proceeding, the judge stands and faces the jury and the
10 jury faces the judge. This is the best way that I know how to
11 symbolize the important role that we both play in these
12 proceedings. My job has been three-fold: The first was to
13 impanel a fair and impartial jury. On behalf of everyone in
14 this room, I want to thank you for service. There was a long
15 line of people -- you remember them way back then -- who
16 couldn't serve or wouldn't serve or had an issue. You all
17 agreed to serve, a very important constitutional role, and I
18 want to thank you all for serving.

19 My second job was to rule on the evidentiary
20 objections. Sometimes we did it a little before you came in in
21 the morning, and I apologize now if we were a little delayed
22 coming out. Sometimes we did it after you left. Sometimes we
23 did it in front of you. Now my third and final task is to give
24 you my instructions of law. You must follow those instructions
25 whether you agree with them or not.

1 Now, I've got the easy job and you've got the tough
2 job because you're the ones who must render a unanimous
3 verdict. You are the ones who must decide the credibility of
4 the witnesses. "Verdict" means to speak the truth, and that is
5 your job.

6 My jury instructions are divided into three portions.
7 None of them are more important than the other. The first is
8 quite general, what is evidence, what isn't evidence. It goes
9 to the very important constitutional principles that govern
10 this case, and I remind you that when I asked you these
11 questions on the day of impanelment, you all said you could
12 follow these basic constitutional principles. The middle
13 portion is very specific to the verdict form that I handed out
14 to you before the closing arguments. I am going to tell you
15 the elements that the government must prove beyond a reasonable
16 doubt. And my third part of this jury instructions is what I
17 call the mechanics of deliberation: how to choose a
18 foreperson, what is the role of the alternate, and what does it
19 mean to deliberate?

20 Now, let me also say that I will be giving you a tape
21 recording of my charge so that you can get going tomorrow on it
22 if you're too tired to take notes tonight. It's been a long
23 day. But also Lee will be working on a transcript of the
24 charge, so sometime tomorrow you'll have a full transcript of
25 the charge. Nonetheless, it might be helpful to jot down

1 little notes about what I'm saying so then you can know where
2 to look for that portion of the charge that you may need to
3 look. So why don't we sit down and we'll get going.

4 Let me begin with the role of the Court. These
5 instructions are about the law you must apply. I do not mean
6 any of my instructions to be understood by you as a comment by
7 me on the facts or the evidence in this case. You are the
8 judges of the facts and the sole judges of the credibility of
9 the witnesses. You should consider these instructions as a
10 whole. I may repeat some portions, but that does not mean that
11 they are more important. All of the instructions are equally
12 important. Even if you disagree with some of the rules of law
13 or don't understand the reasons for them, you're bound to
14 follow them as jurors in this case. This is a fundamental part
15 of our system of government by law rather than by the
16 individual views of the judge and the jurors who have the
17 responsibility for deciding a specific case.

18 To the extent I say something differently from what
19 the attorneys say, you must follow my instructions of law.
20 However, as I just emphasized, I am not the judge of the facts
21 and have no opinion as to the appropriate outcome of this case.
22 You must disregard any facial expressions you think I may have
23 had. Also, if at any point, either beginning with impanelment
24 but all the way through, I state the evidence differently from
25 your memory of the evidence, you must disregard my memory of

1 the evidence. It's your memory that counts.

2 What is your function as the jury? Your function is
3 to determine the facts. You are the sole and exclusive judges
4 of the facts. You decide the weight, effect, and value of the
5 evidence. You also decide the credibility of the witnesses.
6 Once you determine the facts, it is your duty to apply those
7 facts to the law as I explain it. You must decide whether
8 Dr. Zolot and Ms. Pliner are guilty or not guilty of the
9 charges that the United States has brought against them. You
10 must determine the facts without prejudice, fear, favor, bias,
11 or sympathy. You also may not consider any personal feelings
12 you may have about the race, religion, national origin, sex, or
13 age of Dr. Zolot, Nurse Pliner, or of any witness who testified
14 during the trial. You must determine the facts solely from a
15 fair consideration of the evidence. If you let fear, favor,
16 prejudice, bias, or sympathy enter into your deliberations,
17 there is a risk that you will not arrive at a just and true
18 verdict.

19 The issue before you is not whether you are for or
20 against the crimes charged. Rather, the issue is whether the
21 government has proven beyond a reasonable doubt that these
22 defendants are guilty of the crimes charged. You also should
23 not be influenced by the fact that the United States of America
24 has brought this case. All parties, the government, Dr. Zolot,
25 and Ms. Pliner, stand as equals before the Court. So when you

1 go back into the jury room, the question can never be, will the
2 government win or lose the case? You represent the people of
3 the United States of America, and the people of this country
4 always win when justice is done.

5 You're not to decide the case based on what you have
6 heard or read outside the courtroom. You cannot speculate or
7 guess as to what might or might not have happened. You cannot
8 allow yourself to be influenced by your view of the nature of
9 the crimes with which the defendants have been charged or the
10 consequences of your verdict. Instead, you must confine your
11 deliberations to the evidence and nothing but the evidence.

12 The lawyers were allowed to comment during the trial
13 both on the evidence and the rules of law, but if they have
14 said anything about the evidence different from your memory,
15 your collective memory controls; and if what they've said about
16 the law seems to have a different meaning in any way from my
17 instructions, you must be guided by these instructions.

18 I'm moving on to the question of, what is evidence?
19 The evidence from which you are to decide what the facts are
20 consists of the sworn testimony of the witnesses, both on
21 direct and cross-examination, regardless of who called the
22 witness, and the exhibits that have been received into
23 evidence. You're not limited solely to what you see and hear
24 as the witnesses testify. You are permitted to draw from facts
25 you find to have been proven such reasonable inferences as you

1 believe are justified in light of common sense and personal
2 experience.

3 The mere number of witnesses, the length of the
4 testimony, or the number of exhibits has no bearing on what
5 weight you give to the evidence or whether you find that the
6 government's burden of proof has been met. Weight does not
7 mean the amount of evidence. Weight means your judgment about
8 the credibility and importance of the evidence.

9 As I mentioned during the trial, in light of the
10 volume of documents in this case, both the government and
11 Dr. Zolot and Nurse Pliner have introduced into evidence
12 selected portions of various patient files to which they've
13 called your attention. These exhibits are available to you in
14 the jury room; and for most patients as to whom any portions of
15 their file have been admitted into evidence, you will also have
16 it on electronic form, that screen that's in your room, and
17 we'll show you how to use it, for the entire patient file,
18 which you're free to examine on the system. If requested, we
19 will also provide -- and I think you have a lot of them
20 anyway -- full copies of the full patient files.

21 As I mentioned, it is your duty to determine the
22 facts. In doing so, you can consider only the evidence which I
23 have admitted. Certain things, though, are not evidence in the
24 case, and I'm about to go through things that are not evidence
25 in this case. The opening statements and closing arguments

1 made by the lawyers are not evidence in the case. Questions of
2 counsel are not evidence. Only the witnesses' answers are
3 evidence. Questions that are not answered or as to which
4 objections were sustained are not evidence in the case. The
5 function of the lawyers in making their arguments is to point
6 out those things that are most significant and helpful to their
7 side of the case, and, in so doing, to call your attention to
8 certain facts or inferences that might otherwise escape your
9 notice; but in the final analysis, it is your recollection and
10 interpretation of the evidence that controls in this case.

11 At times during the trial lawyers made objections. In
12 fact, often during the trial lawyers made objections, sometimes
13 to questions asked by other lawyers and sometimes it was to the
14 answers given by the witness, and they asked me to make certain
15 rulings. So sometimes I said "sustained," which means I agreed
16 with the basis for it and you couldn't hear it. Sometimes I
17 said "overruled," and you can treat that evidence like any
18 other. These rulings are only to the legal questions that I
19 had to determine and should not influence your thinking. So
20 when I sustained an objection to a question, sometimes the
21 witness answered anyway. You cannot consider any answer that
22 came in after I sustained an objection. And also, to the
23 extent they didn't answer, don't try to speculate or guess what
24 the right answer may have been. So sometimes I told you not to
25 consider a particular statement and I would strike it, so don't

1 consider it for anything. Put it out of your mind, and don't
2 refer to that statement in your deliberations.

3 Now, sometimes I said something was allowed in for a
4 limited purpose. Remember, sometimes it was hearsay, but I
5 said, well, maybe you can consider it for somebody's state of
6 mind. So you should consider the evidence only consistent with
7 the limitations that I placed on it.

8 Now, often during the trial I made comments to
9 lawyers, sometimes in connection with objections or timing, or
10 occasionally asked a question of a witness, or if I thought
11 something wasn't clear, or wasn't speaking loudly enough, which
12 often happened. Don't assume from anything I may have said
13 that I have an opinion concerning any of the issues of the
14 case. Except for my instructions to you on the law, you should
15 disregard anything I may have said during the trial in arriving
16 at your findings as to the facts.

17 Now, let me talk to you about direct and
18 circumstantial evidence. You remember I talked to you about it
19 at the beginning of the trial, direct and circumstantial
20 evidence. There are two types of evidence which you may use to
21 determine the facts of the case, direct evidence and
22 circumstantial evidence. Direct evidence is direct proof of a
23 fact such as the testimony of an eyewitness, that the witness
24 saw something or heard something or felt something. That's
25 direct testimony. Circumstantial evidence is different.

1 Circumstantial evidence is proof of a fact or facts from which
2 you may draw the inference by reason and common sense that
3 another fact exists, even though it has not been proven
4 directly. Any inferences or conclusions that you draw must be
5 reasonable and natural based on your common sense and
6 experience of life. In a chain of circumstantial evidence, it
7 is not required that each one of your inferences and
8 conclusions be inevitable, but it is required that each of them
9 be reasonable.

10 Direct and circumstantial evidence have equal standing
11 in the law. That is, with respect to what weight shall be
12 given to evidence before you, the law makes no distinction
13 between direct and circumstantial evidence. Also, no greater
14 degree of certainty is required of circumstantial evidence than
15 of direct evidence. In reaching your verdict, you can draw and
16 rely upon inferences from the evidence. You are to consider
17 all the evidence in the case and give each item of evidence the
18 weight you believe it deserves; but whether the evidence is
19 direct evidence or circumstantial evidence, the government must
20 prove Dr. Zolot's and Nurse Pliner's guilt beyond a reasonable
21 doubt from all the evidence in the case.

22 Now let me discuss for a minute the credibility of
23 witnesses. As jurors, your function is to evaluate the
24 exhibits that have been introduced and to determine the
25 credibility of the witness's testimony. It is your function to

1 determine the believability of each witness who testified.

2 You're free to decide that you believe all of what a witness
3 told you, none of what a witness told you, or some of what a
4 witness told you. You're free to do that in accordance with
5 your collective judgment as to the believability of what it was
6 that the witness told you while testifying.

7 Now, nothing I say can tell you all the important ways
8 to go about assessing credibility. You know, often when I have
9 to make facts, I'd give anything to have a whole jury of people
10 to talk about credibility, but I suggest there are certain
11 things you should consider, like the conduct and demeanor of
12 the witness while testifying, the frankness or lack of
13 frankness that the witness showed while testifying, the
14 reasonableness or unreasonableness of the witness's testimony,
15 the probability or improbability of the testimony, the
16 opportunity or lack of opportunity that the witness had to see
17 and know the facts about which he or she was testifying, the
18 accuracy of the witness's recollection, the degree of
19 intelligence shown by the witness, the witness's prior conduct
20 for truthfulness, and whether the witness attempted to fill in
21 gaps in his or her memory of events with information he or she
22 obtained after the event. You also may consider whether the
23 witness has a motive for testifying and the interest or lack of
24 interest that the witness may have in the outcome of the case.
25 You may take into consideration the character and the

1 appearance of the witness at trial and any bias he or she has
2 shown in his or her testimony. The list is not exhaustive but
3 rather a list of examples of the kind of factors you can take
4 into account and should account for in making a credibility
5 judgment.

6 Let me discuss for a minute expert witnesses. You
7 have heard testimony from persons described as experts. An
8 expert witness has special knowledge or experience that allows
9 the witness to give an opinion. Expert testimony should be
10 considered just like any other testimony. You may accept or
11 reject it and give it as much weight as you think it deserves.
12 In weighing the testimony, you should consider the facts that
13 generally bear upon the credibility of a witness as well as
14 each witness's education and experience, the soundness of the
15 reasons given for the opinion, the acceptability of the methods
16 used, and all the other evidence in the case.

17 In this case, you heard expert testimony concerning
18 the standards and practices in medical practice. While you may
19 find that testimony useful, ultimately it is for you and you
20 alone to decide whether the witness prescribed controlled
21 substances not in the usual course of professional practice and
22 for other than a legitimate medical purpose.

23 Now let me talk about inconsistencies in the evidence.
24 You may consider inconsistencies or differences as you weigh
25 the evidence, but you do not have to discredit testimony merely

1 because there are inconsistencies or differences in the
2 testimony of a witness or between the testimony of different
3 witnesses. Two or more witnesses witnessing an incident or
4 transaction may see or hear it differently. In weighing the
5 effect of any consistency or difference, you may consider
6 whether it is a matter of importance or an unimportant detail,
7 and whether it results from innocent error or intentional
8 falsehood.

9 You're not required to accept testimony, even if it is
10 uncontradicted. You may decide because of the witness's
11 bearing and demeanor, or because of inherent improbability, or
12 for any other reasons sufficient to you, that the testimony is
13 not worthy of belief. As I mentioned before, you can accept
14 all of a witness's testimony, reject all of it, or accept parts
15 and reject others.

16 Now, let me remind you of a limiting instruction I
17 gave you way at the start of the case, and I actually may have
18 given it to you a second time during the course of the trial as
19 well. The government does not contend that the controlled
20 substances prescribed by the defendants caused the deaths of
21 the patients named in the indictment. I instruct you, it is
22 not an issue in this case whether the drugs prescribed by the
23 defendants caused the deaths of the patients. You are not to
24 consider that question in this case.

25 All right, now, let's stand and stretch because I am

1 about to embark on the United States Constitution. Okay, why
2 don't we stand and stretch.

3 (Pause.)

4 I begin with the presumption of innocence. It is a
5 cardinal principle of our system of justice that every person
6 accused of a crime is presumed to be innocent unless and until
7 his or her guilt is established beyond a reasonable doubt.
8 This presumption is not a mere formality. It is a matter of
9 the most important substance. The presumption of innocence
10 alone may be sufficient to raise a reasonable doubt and to
11 require the acquittal of a defendant.

12 The defendants before you, Joseph Zolot and Lisa
13 Pliner, have the benefit of that presumption of innocence
14 throughout the trial, and you are not to convict him or her --
15 and, of course, you have to consider each person separately --
16 and you're not to convict him or her of a particular charge
17 unless you are persuaded of his or her guilt of that charge
18 beyond a reasonable doubt.

19 The presumption of innocence until proven guilty means
20 that the burden of proof is always on the government to satisfy
21 you that the defendants are guilty of the crime with which they
22 are charged beyond a reasonable doubt. It is a heavy burden,
23 but the law does not require that the government prove guilt
24 beyond all possible doubt. Proof beyond a reasonable doubt is
25 sufficient to convict. The burden never shifts to the

1 defendants. It is always the government's burden to prove each
2 of the elements of the crimes charged beyond a reasonable doubt
3 by the evidence and the reasonable inferences to be drawn from
4 the evidence. Each defendant has the right to rely upon the
5 failure or inability of the government to establish beyond a
6 reasonable doubt any essential element of a crime charged
7 against him or her.

8 Now, I will be going through these elements, each one
9 of which the government must prove beyond a reasonable doubt.
10 If after a fair and impartial consideration of all the evidence
11 you have a reasonable doubt as to Dr. Zolot's or Ms. Pliner's
12 guilt of a particular crime, it is your duty to find him or her
13 not guilty of that crime. On the other hand, if after a fair
14 and impartial consideration of all the evidence you are
15 satisfied beyond a reasonable doubt of Dr. Zolot's or
16 Ms. Pliner's guilt of a particular crime, you should vote to
17 convict him or her.

18 So what is the burden of proof here? The United
19 States has the burden of proving beyond a reasonable doubt that
20 Dr. Zolot and Ms. Pliner are guilty of the crimes charged by
21 the indictment. The burden of proof rests on the United States
22 and never shifts to the defendants. The defendants are not
23 required to prove anything to you or present any evidence.
24 Because of the constitutional right to the presumption of
25 innocence, the government has the burden of proof beyond a

1 reasonable doubt on every essential element of the crime
2 charged.

3 So what is proof beyond a reasonable doubt? What is
4 proof beyond a reasonable doubt? Reasonable doubt is a doubt
5 based on reason and common sense. The law does not require
6 that the government prove guilt beyond all possible doubt --
7 little in life can be proven to an absolute certainty -- but
8 the law does require that the government prove each of the
9 elements of the crime charged beyond a reasonable doubt. It is
10 not sufficient for the government to establish a probability,
11 though a strong one, that an element of a crime charged is more
12 likely to be true than not true. That is not enough to meet
13 the government's heavy burden of proof beyond a reasonable
14 doubt.

15 A reasonable doubt may arise not only from the
16 evidence produced but also from a lack of evidence. Of course,
17 a defendant never is to be convicted based upon suspicion or
18 conjecture. If after a fair and impartial consideration of all
19 the evidence you have a reasonable doubt, it is your duty to
20 acquit. On the other hand, if after a fair and impartial
21 consideration of all the evidence you are satisfied that the
22 government has proven each element of the charges in the
23 indictment beyond a reasonable doubt, you should vote to
24 convict. It is not necessary for you to conclude that the
25 defendants are factually innocent in order to return a "not

1 guilty" verdict. Such a verdict means only that the
2 prosecution has not met its burden of proving the defendants'
3 guilt beyond a reasonable doubt.

4 The defendants have not testified in this trial. It
5 is the law of the United States that the defendant has an
6 absolute right not to testify. A defendant is under no
7 obligation or need to do so. There are many reasons for not
8 testifying, reasons that are quite consistent with innocence.
9 Therefore, you are not to speculate or engage in conjecture as
10 to those reasons, and, as I have said, you are to draw no
11 adverse inferences whatsoever. If you were to do so, you would
12 be doing our nation and our body of law a disservice and an
13 injustice. Moreover, you would be violating your solemn oath
14 as jurors. Once again, it is the burden of the United States
15 to prove all the elements of the charges beyond a reasonable
16 doubt, and the defendant has no burden whatsoever.

17 Now, let me talk to you for a minute about punishment.
18 The question of possible punishment of a defendant is of no
19 concern to you, the jury, and should not in any sense enter
20 into or influence your deliberations. The duty of imposing a
21 sentence rests exclusively upon the Court. Your function is to
22 weigh the evidence in the case and to determine whether or not
23 the defendant is guilty beyond a reasonable doubt solely based
24 on the evidence. Under your oaths as jurors, you cannot allow
25 a consideration of the punishment, which may be imposed upon

1 either defendant if he or she is convicted, to influence your
2 verdict in any way or enter into your deliberations in any
3 sense.

4 Now, I have just finished what I call part one, which
5 is, generally speaking, what's evidence, what are the
6 constitutional principles? I am now embarking on part two,
7 which is very specific to the elements of the offenses charged,
8 so I hope you get out that verdict form. Does everyone still
9 have one? So, please, why don't you pull that out. Is
10 everyone okay? Did someone leave it back in the lunchroom,
11 anybody? Set to go? Good.

12 All right, so Count 1. In Count 1 Dr. Zolot and
13 Ms. Pliner are accused of conspiring to commit a federal crime;
14 specifically, conspiracy to distribute controlled substances,
15 methadone, oxycodone, and fentanyl, knowingly and intentionally
16 outside the usual course of professional practice and not for
17 legitimate medical purposes. It is against the federal law to
18 conspire with someone to commit this crime. Now, I'm going to
19 talk to you and give you the specific elements of that crime
20 later in the jury instructions. Right now, though, let me talk
21 to you about what the government must prove to prove
22 conspiracy.

23 For you to find each defendant guilty of conspiracy,
24 you must be convinced that the government has proven each of
25 the following things beyond a reasonable doubt. These

1 things -- and I keep referring to them as elements. Elements
2 mean the things the government has to prove beyond a reasonable
3 doubt. First, the government must prove that the agreement
4 specified in the indictment, and not some other agreement or
5 agreements, existed between at least two people to distribute
6 methadone, oxycodone, and/or fentanyl, knowingly and
7 intentionally, outside the usual course of professional
8 practice and not for a legitimate medical purpose. So I'm
9 going to repeat that so you can get that down: First, that the
10 agreement specified in the indictment, and not some other
11 agreement or agreements, existed between at least two people to
12 distribute methadone, oxycodone, and/or fentanyl, knowingly and
13 intentionally, outside the usual course of professional
14 practice and not for a legitimate medical purpose.

15 Although you have heard about other medications in
16 this case such as benzodiazepines, Soma and others, there is no
17 charge that Dr. Zolot and Nurse Pliner committed a crime by
18 distributing those other substances, whether in a conspiracy or
19 otherwise. However, this evidence of other drugs may be
20 relevant to other issues in the case.

21 So the second element the government must prove beyond
22 a reasonable doubt is that Dr. Zolot and Ms. Pliner willfully
23 joined in the agreement. That is, they must prove that
24 Dr. Zolot and Ms. Pliner willfully joined in that agreement.

25 What is a conspiracy? A conspiracy is an agreement,

1 spoken or unspoken. The conspiracy does not have to be a
2 formal agreement or a plan in which everyone involved sat down
3 together and worked out all the details, but the government
4 must prove beyond a reasonable doubt that those who were
5 involved shared a general understanding about the crime. Mere
6 similarity of conduct among various people or the fact that
7 they may have been associated with each other or discussed
8 common names and interests does not necessarily establish proof
9 of the existence of a conspiracy, but you may consider such
10 factors.

11 What does "willfully" mean? To act willfully means to
12 act voluntarily and intelligently and with a specific intent
13 that the underlying crime be committed; that is to say, with
14 bad purpose either to disobey or disregard the law, not to act
15 by ignorance, accident, or mistake. The government must prove
16 two types of intent beyond a reasonable doubt before each
17 defendant can be said to have willfully joined in a conspiracy:
18 an intent to agree and an intent, whether reasonable or not,
19 that the underlying crime be committed. Mere presence at the
20 scene of a crime is not alone enough, but you may consider it
21 among other factors. Intent may be inferred from the
22 surrounding circumstances.

23 Proof that Dr. Zolot and Ms. Pliner willfully joined
24 in an agreement to illegally distribute methadone, oxycodone,
25 and/or fentanyl must be based upon evidence of his or her own

1 words and actions. You need not find that he or she agreed
2 specifically to all of the details of the crime, or knew about
3 all the details of the crime, or that he or she participated in
4 each act of the agreement or played a major role, but the
5 government must prove beyond a reasonable doubt that he or she
6 knew the essential features and general aims of the venture.
7 On the other hand, a person who has no knowledge of a
8 conspiracy but simply happens to act in a way that furthers
9 some object or purpose of a conspiracy does not thereby become
10 a conspirator.

11 The government does not have to prove that the
12 conspiracy succeeded or was achieved. The crime of conspiracy
13 is complete upon the agreement to distribute methadone,
14 oxycodone, and/or fentanyl other than for a legitimate medical
15 purpose and not in the usual course of professional practice.

16 The government alleges that the conspiracy charged
17 against each defendant in Count 1 existed from October, 2003,
18 to on or about May 17, 2007. In determining whether the
19 defendants conspired as charged, you need not find that the
20 conspiracy existed at the exact time or over the entire period
21 charged. The government must prove beyond a reasonable doubt
22 that the conspiracy was in existence from some period of time
23 reasonably near the time alleged or for some portion of the
24 period alleged.

25 You have heard evidence concerning certain alleged

1 acts and statements of Dr. Zolot and Ms. Pliner. The
2 reasonably foreseeable acts, declarations, statements, and
3 omissions of any member of the conspiracy and in furtherance of
4 the common purpose of the conspiracy are deemed under the law
5 to be the acts of all the members, and all the members are
6 responsible for such acts, declarations, statements, and
7 omissions. This is so even if the acts or statements in
8 question were done or made in the absence of a defendant and
9 without his or her knowledge.

10 Before you consider these statements or acts of an
11 alleged co-conspirator in deciding the issue of either
12 defendants' guilt, you must determine that the acts and
13 statements were made during the existence and in furtherance of
14 the unlawful scheme. If the acts were done or the statements
15 made by someone whom you do not find to have been a member of
16 the conspiracy, or if they were not done or said in furtherance
17 of the conspiracy, then they may not be considered by you as
18 evidence against either defendant.

19 So as you heard several times over the course of the
20 trial, I want to remind you that you cannot consider any acts
21 or statements by Dr. Zolot against Ms. Pliner prior to October,
22 2003 -- remember we kept hearing that date -- prior to October,
23 2003, the time when she joined in the medical practice. You
24 should also not consider any acts or statements by Dr. Zolot
25 against Ms. Pliner or by Ms. Pliner against Dr. Zolot that

1 occurred after the conspiracy ended, allegedly on or about
2 May 17, 2007.

3 So I just finished Count 1, and I'm going to go 2
4 through 8, to Counts 2 through 8.

5 Now, I just want to just focus you on this to be very
6 careful. I tried to be very careful here that some of these
7 counts are only against one person and some are against both,
8 so please focus on that as you're going through it.

9 In Counts 2 through 8 of the indictment, the
10 government charges that the defendants distributed controlled
11 substances to certain named individuals on certain dates --
12 and, by the way, I've put the dates down there so that you're
13 focused on the correct prescription that's being charged -- on
14 certain dates other than for a legitimate medical purpose and
15 outside the usual course of professional practice in violation
16 of the Controlled Substances Act. All right, so I'm going to
17 talk to you now about that.

18 Under federal law, someone who is a practitioner is
19 authorized to prescribe drugs in the course of professional
20 practice. The definition of "practitioner" includes licensed
21 doctors and nurses. A practitioner who in good faith writes
22 prescriptions for drugs in the regular course of a legitimate
23 professional practice is protected from prosecution under the
24 statute, but practitioners who act outside the usual course of
25 professional practice and prescribe drugs for no legitimate

1 medical purpose may be guilty of violating the law.

2 For you the jury to find each defendant guilty of
3 distributing a controlled substance other than for a legitimate
4 medical purpose and outside the usual course of professional
5 practice, you must find that the government proved each of the
6 following elements beyond a reasonable doubt. The government
7 must prove beyond a reasonable doubt, first, that the defendant
8 distributed methadone, oxycodone, and/or fentanyl, not any
9 other medication. And the distribution of the controlled
10 substance, as I mentioned, is on the verdict slip. So, first,
11 the government must prove beyond a reasonable doubt that the
12 defendant distributed the controlled substance charged in the
13 count.

14 Second, the government must prove that the defendant
15 acted knowingly and intentionally. Second, the government must
16 prove that the defendant acted knowingly and intentionally.

17 And, third, the government must prove beyond a
18 reasonable doubt that the defendant distributed the drug other
19 than for a legitimate medical purpose and not in the usual
20 course of professional practice. Third, the government must
21 prove beyond a reasonable doubt that the defendant distributed
22 the drug other than for a legitimate medical purpose and not in
23 the usual course of professional practice.

24 The first thing you need to determine is whether the
25 defendant distributed controlled substances. Methadone,

1 oxycodone, and fentanyl are controlled substances within the
2 meaning of the law. "Distribute" means to transfer a
3 controlled substance to another person. A medical professional
4 such as a doctor or nurse practitioner can lawfully distribute
5 a controlled substance to an individual by writing a
6 prescription to be filled at a pharmacy. However, if that
7 medical professional has written the prescription other than
8 for a legitimate medical purpose and outside the usual course
9 of professional practice, that medical professional has
10 distributed a controlled substance within the meaning of the
11 statute.

12 The second element that the government must prove
13 beyond a reasonable doubt is that when the defendant prescribed
14 the drug or drugs, they did so know knowingly and
15 intentionally. That is, the government must prove that the
16 defendant acted voluntarily and intentionally and not out of
17 mistake, accident, or carelessness.

18 The third and final element the government must prove
19 beyond a reasonable doubt is that the defendant knowingly and
20 intentionally prescribed the drug other than for a legitimate
21 medical purpose and outside the usual course of professional
22 practice. In making a medical judgment concerning the right
23 treatment for an individual patient, medical professionals have
24 discretion to choose among a wide range of available options.
25 Therefore, in determining whether the defendant acted without a

1 legitimate medical purpose, you should examine each defendant's
2 actions and the circumstances surrounding them.

3 It is not enough for you to find that each defendant
4 simply wrote the prescriptions at issue here. The government
5 must prove that the medical professional intentionally and
6 knowingly acted outside the usual course of medical practice
7 and without a legitimate medical purpose when he or she wrote
8 the prescription. That is, the government must prove beyond a
9 reasonable doubt that defendants believed they were acting
10 illegally under a criminal drug law by writing the
11 prescription.

12 This case is not a medical malpractice lawsuit. A
13 medical professional becomes a criminal not when he or she is a
14 bad or negligent physician or nurse practitioner but when he or
15 she ceases to be a medical professional at all. You must make
16 this determination with respect to the charged conduct in each
17 of the counts, including the conspiracy count. Mere
18 negligence, malpractice, carelessness, or sloppiness is not
19 enough. In order to convict the defendant of distributing
20 controlled substances in violation of the Controlled Substances
21 Act, you must find that the government has proven beyond a
22 reasonable doubt that the defendants intended to act as drug
23 pushers rather than as medical professionals by knowingly and
24 intentionally acting outside the usual course of professional
25 practice and not for a legitimate medical purpose.

1 It is up to you to resolve conflicting testimony and
2 evidence as to whether the government has proven that the
3 defendants knowingly and intentionally acted outside the usual
4 course of professional practice and not for legitimate medical
5 purpose, taking into account the expert testimony you have
6 heard over the course of the trial as well as all of the
7 evidence introduced by the parties.

8 I instruct you that the Massachusetts -- you remember
9 the Massachusetts Board of Registration -- I instruct you that
10 the Massachusetts Board of Registration in Medicine Prescribing
11 Practices Policies and Guidelines is relevant but not binding
12 on you in making this determination. Those guidelines are not
13 the law. They are guidelines. Any violation of those
14 guidelines is not sufficient for you to find that either
15 defendant is guilty of the crimes the government has charged.
16 However, you may consider them in deciding whether the
17 government has met its burden of proving that the defendants
18 knowingly and intentionally acted outside the usual course of
19 professional practice and not for a legitimate medical purpose.

20 In deciding whether each defendant acted knowingly,
21 you may infer that the defendant had knowledge of a fact if you
22 find that he or she deliberately closed his or her eyes to a
23 fact that otherwise would have been obvious to him or her. In
24 order to infer knowledge, you must find that two things have
25 been established: first, that the defendant was aware of a

1 high probability of the fact in question, and, second, that
2 each defendant consciously and deliberately avoided learning of
3 that fact; that is to say, that each defendant willfully made
4 himself or herself blind to that fact.

5 It is entirely up to you to decide and determine
6 whether Dr. Zolot or Nurse Pliner deliberately closed his or
7 her eyes to the fact, and, if so, what inference should be
8 drawn from it. However, it is important to bear in mind,
9 again, that mere negligence or mistake and failing to learn the
10 fact is not sufficient. There must be a deliberate effort to
11 remain ignorant of the fact.

12 Let me talk to you about good faith. The government
13 must prove that the defendants did not act in good faith. A
14 medical professional's good faith is relevant to your
15 determination of whether the defendant intentionally acted
16 outside the bounds of accepted medical practice and without a
17 legitimate medical purpose. A doctor or nurse practitioner
18 distributes a drug in good faith in medically treating a
19 patient when he or she distributes the drug for a legitimate
20 medical purpose and in the usual course of medical practice.
21 Good faith in this context means good intentions and the honest
22 exercise of professional judgment as to a patient's needs. It
23 means that the doctor or nurse acted in accordance with what he
24 or she reasonably believed to be a standard of medical practice
25 generally recognized and accepted in the United States. Good

1 faith is not merely a practitioner's sincere intentions towards
2 his or her patients but also a sincere attempt to conduct
3 himself or herself in accordance with what he or she reasonably
4 believed to be proper medical practice.

5 The defendants do not have to prove to you that they
6 acted in good faith. Rather, the burden is on the government
7 to prove to you beyond a reasonable doubt that the defendant
8 acted without a legitimate medical purpose and outside the
9 course of usual medical practice. The government must prove
10 beyond a reasonable doubt that the defendants did not act in
11 good faith with respect to each of the eight counts, including
12 the conspiracy charge and the seven charged distributions. If
13 you find that the defendants acted in good faith in
14 distributing the drugs, then you must find him or her not
15 guilty.

16 Now, you may notice that in Counts 4 and 5, both
17 Ms. Pliner and Dr. Zolot are charged with the distribution, and
18 Dr. Zolot is charged -- let me back up. Ms. Pliner is charged
19 with the distribution, and Dr. Zolot is charged with aiding and
20 abetting. What does aiding and abetting mean? To aid and abet
21 means intentionally to help someone else commit a crime. To
22 establish aiding and abetting, the government must prove beyond
23 a reasonable doubt two things, two elements:

24 First, that Nurse Pliner committed the crime knowingly
25 and intentionally writing the charged prescriptions for Thomas

1 Dunphy outside the usual course of professional practice and
2 not for legitimate purpose. And, second, the government must
3 prove beyond a reasonable doubt that Dr. Zolot knowingly and
4 willfully -- that is, deliberately and intentionally with a
5 specific intent to facilitate the crime as I have defined it --
6 associated himself in some way with those crimes and willfully
7 participated in those crimes as he would in something he wished
8 to bring about through some affirmative act in furtherance of
9 the offense. This means that the government must prove beyond
10 a reasonable doubt that the defendant consciously shared the
11 other person's knowledge of the underlying criminal act and
12 intended to help her.

13 The defendant need not perform the underlying criminal
14 act, be present when it is performed, or be aware of the
15 details of its execution to be guilty of aiding and abetting,
16 but a general suspicion that an unlawful act may occur or that
17 something criminal is happening is not enough. Mere knowledge
18 that a crime is being committed also is not sufficient to
19 establish aiding and abetting. An act is done willfully if it
20 is done voluntarily and intentionally with the intent that
21 something the law forbids be done; that is to say, with bad
22 purpose either to disobey or disregard the law.

23 Now, one final thing. You've heard testimony that
24 Defendant Pliner was an employee of the Nonsurgical Orthopedic
25 Center. It is not a defense that the defendant was simply

1 following orders if the defendant was aware of the illegality
2 of her conduct. In other words, the fact that criminal conduct
3 was authorized, directed, or orchestrated by another individual
4 or that the defendant was acting at the direction of another
5 individual is not a defense if the government proves beyond a
6 reasonable doubt that the defendant was aware that the conduct
7 was illegal.

8 So now -- I'm sure you're thrilled to hear this -- I
9 am moving into what I call the third portion, which is the
10 mechanics of getting this case to you for deliberation. So let
11 me talk to you, what do you do when you go back into that jury
12 room? What's your first step? Your first step is to pick a
13 foreperson. Now, when I was a young judge -- I'm not
14 anymore -- when I was a new judge on this bench 20 years ago,
15 actually, I used to look at you and figure out who was taking
16 notes and who had come on time and the first thing crack in the
17 morning. I don't anymore. You all have been with each other
18 for a few months. You know who will be the first person, the
19 best person to be your foreperson, and what you should do is go
20 back into that jury room and choose the foreperson. But the
21 foreperson is not more equal than the rest of you. You heard
22 them say, "We are content with you, the jury." You have been a
23 fabulous jury.

24 So the foreperson has three obligations to me. You
25 notice things come in threes? The first is, the foreperson

1 will lead the discussions, but the foreperson is not more equal
2 than the rest in the sense that all the votes are the same.
3 The second is, the foreperson fills in the verdict slip, fills
4 in the verdict slip; and the verdict must be unanimous, twelve
5 out of twelve, must be unanimous. I never want to hear a
6 running tally: "Well, we're going at six-six and moving up to
7 seven." I don't want to hear it. I don't want to hear from
8 anyone until the verdict is unanimous. So the foreperson fills
9 in that verdict slip, certifies it is unanimous, dates it and
10 signs it.

11 The foreperson will also write me questions. I've
12 gone through a lot. Today has been an amazing day, right?
13 I've gone through a lot. You'll have a transcript. You'll
14 have the tape recording. You may have a legal question, or it
15 may be something just as simple as, you know, "We need an easel
16 with paper," or something like that, or, "We can't find an
17 exhibit." The foreperson writes it down and hands it to me.
18 Sometimes I'll scribble back a note: "Oh, no, the exhibit is
19 in there," or, "Here's a supplemental legal instruction," if
20 you don't understand what one of the legal instructions are.
21 Sometimes it may take me a few hours to get back to you because
22 I gather the troops, we all get in here, and we talk through
23 some of your questions. So we will respond to you.

24 The third and final task is, the foreperson will
25 announce the verdict in court, but the foreperson is not

1 standing alone. All the members of the jury are standing
2 together, and you'll hear us say, "So say you, Madam
3 Foreperson? So say you, Mr. Foreperson? So say you, all
4 members of the jury?" So whatever your verdict is on each of
5 the counts, it must be unanimous. All right, so that's what a
6 foreperson does.

7 The one thing you shouldn't do ever is say to me,
8 "What did so-and-so say on such and such a date?" I won't
9 remember. I took notes. I can assure you your twelve
10 collective notes are better than my single note. Now,
11 sometimes people say, "Well, give us a transcript." That's
12 possible, but just understand that it's not like there's some
13 pile of transcripts sitting in some secret room back there.
14 Ms. Marzilli, who's the best there is, will have to work on
15 that transcript because you can't just get the snippet you
16 want. You have to get the whole witness's testimony, or I have
17 one person thinking that one side is unduly emphasizing
18 something, and you need to hear something else, right? So you
19 have to get the whole witness's testimony, and it can sometimes
20 take over a day to get it because I don't want her working till
21 midnight. So don't ask for the transcript unless you really
22 need it, it's going to break a logjam.

23 All right, the second thing is, what is the role of an
24 alternate? Now, this is the part I hate the most. I could
25 have served on juries. Supreme Court Justices serve on juries,

1 but I've never done it. I'm sure if I sat through a whole long
2 trial like this, I would be the one excluded as an alternate.
3 The last person chosen is an alternate. So we lost three
4 people right away in the first week, and I thought for sure we
5 would get to you, but we didn't. The rest of you hung in
6 there, and I really appreciate that. So I'm going to have to
7 ask you for yet another thing, which is, when you go home --
8 you can't come into the verdict -- you can say "good-bye" to
9 everybody today -- I'm going to say "good-bye" to you, we're
10 all going to say "good-bye" to you -- but you can't still talk
11 about the case. And the reason I say that is, I don't know how
12 long these deliberations are going to take. I have no idea how
13 many days that they're going to take, and it's possible because
14 we all know -- I mean, I've talked to some of you about life
15 circumstances -- we don't know what's going to happen, and I
16 have to have twelve people, or I start all over again. So I'm
17 going to ask you not to talk about the case or watch anything
18 in the press, and we will let you know when a verdict comes in.
19 So, unfortunately, I would be reversed in a millisecond if I
20 let you sit in on the deliberations, so let me say thank you,
21 thank you, thank you, and we may still need you, all right?

22 So the last thing I want to talk to you about is the
23 mechanics of deliberations. The jury system, as I keep saying,
24 is really one of the great foundations of our democracy. The
25 right to a jury trial is the only right that exists twice in

1 our Constitution, one in the main body of the Constitution and
2 again in the Bill of Rights. It's a fundamental right, and
3 nobody can go about telling you how to deliberate, but everyone
4 should go in there with an open mind. The way not to go in
5 there is, "I know what I'm going to do, and no one will tell me
6 what else." You need to go in there with an open mind, open to
7 listening to what other people's point of view is, and try and
8 talk through the evidence. So "deliberate" means to think
9 about it, to be open about it, and to talk it through.

10 On the other hand, no one should ever change their
11 mind because, "Oh, it's getting late, and I really do have to
12 get back to work," or, "Oh, I really do have to get back to my
13 life's issues," or, "Oh, a lot of other people think some way
14 other ways, so I don't want to stop this." You've got to each
15 person, because you're all going to be standing there ratifying
16 and voting on this verdict, each person has to come to the
17 conclusion, whatever conclusion you come to, based on a
18 reasonable and principled belief that this is the right
19 verdict.

20 So what I am going to do right now -- let me just make
21 sure I've hit everything. Yes, I guess what I should also add,
22 although Maryellen may be in and out and the court security
23 officer, you can't ask them any questions about the trial.
24 Anything has to come through a written note. Now, I emphasize
25 that because it's like playing telephone; I never get it quite

1 right if you tell Maryellen who tells me. So please write down
2 any question that you may have rather than try and do it
3 orally.

4 So what I'm going to do is, I'm going to come here to
5 sidebar for a few minutes, and I'm going to ask counsel,
6 because I read a lot here -- it's been an unbelievably long
7 day -- and if there's anything that I read incorrectly or I
8 omitted that I promised to do, and if there's something longer
9 and more substantive that's something that we agree to disagree
10 on, we'll do it after the jury leaves, all right? All right,
11 so why don't we come over to sidebar.

12 (Sidebar conference.)

13 THE COURT: A couple of minor things. One, there's a
14 stipulation that's going to go back, and you can consider that
15 like any other evidence in the case.

16 The second thing is, we're going to be, I think,
17 giving you mostly full paper records as well as being on JERS.
18 It may be that there are some that if we don't send you back
19 the full record, just ask for it, but I think you'll be getting
20 both of them. And last but not least, I want you to make this
21 decision. Today we obviously stayed till 5:00, it's an
22 unbelievably long day, but I wanted to get everything to you so
23 that you would be fresh tomorrow morning and get going. But
24 what I want you to figure out is, normally we have been going
25 9:00 to 4:00, and I don't know whether that's because of your

1 schedule. I usually go 9:00 to 5:00 when we deliberate, but if
2 that creates a hardship for all of you, for any of you, let me
3 know. All right, so once again I feed you. You may be totally
4 sick of the sandwiches. We can tell because we see what you
5 eat and don't eat, and my law clerks love what you don't eat,
6 but the question I have is, if there's something else, let
7 Maryellen know.

8 So we're going to sit from 9:00 to 5:00 unless you all
9 feel that -- I don't remember if some of you had childcare
10 obligations and that sort of thing. If there's an issue, we'll
11 go from 9:00 to 4:00, so you can decide that. Nobody should
12 start talking about the case till I send you out in the morning
13 because there is one or two of you who come in sometimes a
14 little later, and you cannot deliberate unless all twelve are
15 in the room. So you'll see, I'll bring you in in the morning.
16 I literally won't let you even sit down. I'll count twelve and
17 send you out again.

18 They've been working unbelievably hard, as you can
19 tell, over the course of the last couple of months, really, and
20 so they don't -- it will just be you and me tomorrow morning,
21 all right? So they don't need to come in. And we'll do it
22 that way every morning until I tell you otherwise. So sleep
23 well. Don't talk about the case. Thank you.

24 Leave the notebooks in the jury room. Leave the
25 binders out, okay? Leave the binders on your chair. All

1 right, so leave those out, but take your notebooks out and the
2 verdict slip.

3 THE CLERK: They can only take their notebooks back.

4 THE COURT: And the verdict slip.

5 THE CLERK: Right, but leave all the other stuff on
6 your chair.

7 (Jury excused.)

8 * * *